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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 716.

SCHATTEN-CYPRESS COMPANY,
Petitioner,

v.

LEE SHOPS, INC.,
Respondent.

On Petition for Certiorari to the United States Court of Appeals for the Sixth Circuit.

## BRIEF FOR RESPONDENT IN OPPOSITION.

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### OPINION BELOW.

The opinion of the Court of Appeals for the Sixth Circuit dated August 27, 1965, is reported at Lee Shops, Inc. v. Schatten-Cypress Company, 350 F. 2d 12.

### JURISDICTION.

The jurisdiction of this Court under 28 U. S. C. 1254 (1) is not contested.

### QUESTIONS PRESENTED.

The two questions presented by the petitioner, Schatten-Cypress Company, in its petition for certiorari are based on the assumption that the Court of Appeals made rul-

ings which it did not actually make. Therefore, neither of the questions stated in the petition is actually presented in this case.

Question I stated by petitioner is whether the Court of Appeals erred in applying the "clearly erroneous" doctrine of Rule 52 of the Federal Rules of Civil Procedure to a finding by the District Court that the demands of Community Investment Corporation as to the insertion of certain provisions in the original ground lease between petitioner and the City of Nashville were "fair and reasonable". The Court of Appeals did not apply the "clearly erroneous" rule to this finding, which was not necessary to the determination of the case.

Question II stated by petitioner is whether the Court of Appeals erred in applying the "clearly erroneous" doctrine of Rule 52 to the District Court's finding that respondent obtained financing from another source. The Court of Appeals did not apply the "clearly erroneous" rule to this finding.

A reading of the opinion will demonstrate that the "clearly erroneous" rule was actually applied by the Court of Appeals to only one finding of fact, and that was the finding that petitioner waived the condition as to a loan by the Community Investment Corporation by agreeing that the loan would be obtained from another lender.

## RULE INVOLVED.

Rule 52 (a) of the Federal Rules of Civil Procedure provides in part as follows:

> ". . . The findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of a trial court to judge of the credibility of the witnesses."

## COUNTER-STATEMENT.

Respondent, Lee Shops, Inc. does not accept petitioner's statement of the facts. A counter-statement is necessary in order to show that the facts are not as stated by petitioner and that the Court of Appeals did not make the rulings attributed to that Court in the petition.

Respondent's complaint in the District Court sought a recovery of $250,000 damages against petitioner for breach of a written agreement of August 19, 1960, obligating petitioner to sublease to respondent real property leased by petitioner from the City of Nashville. The complaint alleged that petitioner breached the contract by subleasing the property to Zayre Corporation (R. 3a-10a).[1] Petitioner's answer admitted the execution of the agreement of August 19, 1960, denied that it was ever obligated to sublease the property to respondent and admitted that it subleased the property to Zayre Corporation (R. 10a-12a). Petitioner's answer does not allege that it was released or discharged from its obligations under the agreement of August 19, 1960.

Paragraph (7) of the agreement of August 19, 1960, provides "that this lease is subject to a loan from the Community Investment Corporation . . . to be used in the construction of the building on said premises" (R. 10a). Petitioner knew that Community Investment Corporation insisted that paragraph 8 of the proposed ground lease between the City and petitioner be changed and that Community would not make the loan to petitioner unless the requested change was made. The language in paragraph 8 that Community wanted changed was the language which required the lessee to deliver the premises to the lessor upon termination in good condition "damage by

[1] "R." refers to the appendices of the record which were filed in the Court of Appeals by petitioner and respondent, "a" being petitioner's appendix and "b" respondent's appendix.

fire, and other casualties and elements as are covered by insurance excepted" (R. 127a). Community wanted the reference to insurance removed so that the quoted language would read "damage by fire, and other casualties excepted" (R. 89a). The lessee would then not be obligated to restore the building if it were damaged by an uninsured casualty. During October and November, 1960, Mr. Schatten, petitioner's president, discussed this requested change with four different persons and in these conversations stated that he did not expect any problem in getting the change made as requested by Community and agreed to get the change made (R. 76a, 84a, 7b, 8b, 18b, 20b, 21b, 23b, 24b). Even though he knew that Community would not make the loan without the requested change in paragraph 8, Mr. Schatten executed a ground lease with the City on December 6, 1960, without ever having made any effort whatsoever to get the language in paragraph 8 changed to that required by Community (R. 15a).

On page 5 of the petition it is stated that there is considerable dispute in the record regarding the question of petitioner's diligence in attempting to obtain the change in the ground lease insisted upon by Community. This statement is incorrect. It was established by undisputed evidence that petitioner did absolutely nothing toward obtaining the change in language insisted upon by Community and, therefore, that petitioner was not diligent (R. 15a, 30a, 3b).

After the ground lease was executed by petitioner on December 6, 1960, it was approved by the City Council and executed by the Mayor in behalf of the City on December 22, 1960 (R. 121a, 171a). Respondent and Community were not informed until December 23, 1960, that petitioner had executed the ground lease with the City without the language in paragraph 8 required by Community as a condition of making the loan (R. 16a).

Thereafter, Community informed petitioner again that the required change in paragraph 8 must be made before it would make the loan (R. 16a).

On page 9 of the petition it is stated that, after the execution of the lease with the City, it was determined that it was not politically feasible to go back before the City Council and request that the language be altered. This statement is not supported by the evidence or the District Court's findings. The attorney for the City told petitioner's attorney that the Council could change the lease (R. 5b, 6b). A member of the Council told petitioner's president that he was willing to sponsor a resolution to make the requested change and that he anticipated no difficulty in getting the Council to approve the change (R. 16a, 6b, 7b). Nevertheless, petitioner took no action to attempt to get the change approved by the Council (R. 16a).

On January 13, 1961, Community suggested that the requirement as to changing paragraph 8 might be waived if the officers of petitioner would personally guarantee that Community would not suffer any loss as a result of paragraph 8 not containing the requested language (R. 16a). On January 17, 1961, petitioner notified Community that the personal guarantee would not be furnished and that it would have to obtain the loan elsewhere (R. 16a).

On page 10 of the petition, it is stated that there is some dispute in the proof as to whether alternate financing was obtained. This statement is not correct, as the evidence that alternate financing was obtained was undisputed. About the end of January or the first of February, 1961, respondent's treasurer talked to petitioner's president by telephone concerning alternate financing. Petitioner's president informed him that it made no difference to him if the financing was obtained from a lender other than Community (R. 16a, 17a, 31a, 12b-13b). On the same day, respondent's treasurer called peti-

tioner's president again and told him that Hub Investment Company had agreed to make the loan (R. 13b). On January 31, 1961, petitioner's attorney agreed with respondent's attorney that it would be satisfactory if alternate financing could be produced and on that same day respondent's attorney concluded an arrangement with Hub Investment Company and petitioner's attorney assured him that this was satisfactory (R. 16a, 17a, 276a-278a). There was no evidence that these conversations did not take place or that Hub did not agree to make the loan. In the Memorandum Opinion overruling petitioner's Motion to Amend the Findings of Fact, the District Court stated: "This testimony as to alternate financing stands without dispute in the record" (R. 31a).

It is stated on page 10 of the petition that these conversations between the attorneys for the parties occurred on either the 30th or 31st of January, 1961, and on page 11 that respondent's attorney did not specifically name the date on which these conversations took place. These statements are inaccurate. It was established by undisputed evidence that these conversations took place on January 31, 1961. Respondent's attorney, Mr. Helman, testified from an entry in his diary that the conversations took place on January 31, 1961 (R. 16a, 17a, 31a, 276a). There was no other evidence as to the day on which the conversations took place.

On February 2, 1961, within forty-eight hours after agreeing to accept alternate financing from Hub Investment Company, petitioner executed a sublease of the property to Zayre Corporation (R. 17a). On February 6, 1961, petitioner notified respondent for the first time that it had subleased the property to Zayre Corporation (R. 17a). Under the lease to Zayre the minimum rental is $6,250 a year more than the minimum rental at which petitioner had agreed to sublease the property to respondent (R. 14a, 17a).

The District Court held that petitioner had a duty to negotiate in good faith to obtain a ground lease from the City that was satisfactory to Community; that petitioner breached this duty with the result that Community did not make the loan; that the failure of Community to make the loan under the circumstances did not relieve petitioner of its obligations to sublease the property to respondent under the Agreement of August 19, 1960; that defendant waived the condition of said Agreement that the lease was "subject to a loan from Community" by failing to act in good faith in regard to the change desired by Community and by agreeing to accept the loan from Hub Investment Company; that petitioner breached the Agreement of August 19, 1960, by subleasing the property to Zayre Corporation; and that respondent suffered damages in the amount of $200,000 (R. 17a-19a).

The Court of Appeals affirmed the judgment of the District Court and held at 350 F. 2d 16:

> "Even though obtaining the loan from Community was a condition precedent to the entering into of the sublease, Schatten-Cypress could not avoid liability by making the performance of the condition impossible, or by preventing it. Gulf Oil Corp. v. American Louisiana Pipe Line Co., 282 F. 2d 401, 404 (C. A. 6, 1960).
>
> "In any event, the Court found that Schatten-Cypress had waived the condition of the agreement as to the loan from Community in favor of a loan from Hub Investment Company. Restatement, Contracts, §§ 296, 297; 17A C. J. S., Contracts, § 491, p. 690. In our judgment this finding was supported by substantial evidence and is not clearly erroneous."

## ARGUMENT.

The petition does not state a case reviewable under Rule 19 of this Court. There are no special and important reasons for granting the writ in this case. The decision of the Court of Appeals is not in conflict with a decision of another court of appeals. The Court of Appeals has not decided a state question in a way that conflicts with applicable state law. There is no question of federal law involved which should be settled by this Court. The Court of Appeals has not decided a federal question in a way that conflicts with a decision of this Court. This case does not involve any departure from the accepted and usual course of judicial proceeding.

The Court of Appeals concurred in all essential findings of fact of the District Court. The petition seeks to have this Court review these concurrent findings by the two lower courts but the petition does not make an obvious and exceptional showing of error. Therefore, the petition should be denied. Graver Mfg. Co. v. Linde Co., 336 U. S. 271, 275.

On page 14 of the petition it is contended that this case requires a determination of whether Community's insistence upon the change in paragraph 8 was reasonable or unreasonable. This contention is not well taken as the determination of that question was not necessary to a decision in this case. Whether or not Community's request for the change in paragraph 8 was reasonable relates only to the question of whether petitioner was discharged from its obligation under the agreement of August 19, 1960, by reason of the failure of Community to make the loan. Although petitioner did not plead discharge as an affirmative defense in its answer, the District Court decided the question and found that Community's request was reasonable. The District Court also found that petitioner waived the condition that the loan would be made by Community by agreeing that the loan would be made by Hub Invest-

ment Company. The Court of Appeals concurred in this finding that petitioner had waived the condition of obtaining a loan from Community. Therefore, the result of the case would not be changed even if Community's request for a change in paragraph 8 had been unreasonable. In any event, the record clearly supports the view that Community's request was reasonable. Petitioner's president agreed to get the change made and anticipated no trouble in doing so. There is nothing to indicate that the City would not have agreed to the change if it had been requested to do so. Petitioner's officers refused to give a personal guarantee that Community would suffer no loss because of the failure to obtain the requested change.

The petitioner's contention that Community's prime security for its loan would be the sublease and that this security would be lost unless petitioner had the duty under paragraph 8 to replace the building in the event of an uninsured casualty is not well taken. Paragraph 8 dealt with petitioner's duties only upon termination of the lease. Therefore, paragraph 8 did not affect the value of the sublease as security since, when paragraph 8 came into play, the sublease and the lease would both have been terminated and the sublease could not then be security for any balance owed by petitioner on Community's loan. After termination of the sublease, Community would be in a much better position to collect any balance owed it by petitioner if petitioner did not then have the additional liability to the City of restoring a building that had been destroyed by an uninsured casualty.

In its original findings, the District Court found that respondent notified petitioner it could obtain the financing from Hub Investment Company and petitioner agreed that this would be satisfactory (R. 16a, 17a). In its original conclusions, the District Court concluded that petitioner waived the condition of obtaining a loan from Community because, among other things, petitioner "agreed to accept

the loan from Hub Investment Company'' (R. 18a). The statement on page 20 of the petition that the only evidence which supports the finding that alternate financing from Hub Investment was obtained was the testimony by deposition of respondent's attorney, Mr. Helman, is not correct. Mr. Helman did testify by deposition that Hub Investment Company agreed to make the loan (R. 277a), but in addition respondent's treasurer, Mr. Klein, testified in person that Hub Investment Company agreed to make the loan (R. 13b). There was no evidence by deposition or otherwise that Hub did not agree to make the loan.

## CONCLUSION.

There are no errors in the decision of the District Court or the Court of Appeals and the Court of Appeals has not misapplied the ''clearly erroneous'' rule as contended by petitioner. This case is, therefore, not an appropriate vehicle for this Court to determine the principles governing the review of findings of district courts based on construction of written contracts or involving the application of this rule to documentary and deposition evidence. The writ of certiorari should be denied.

Respectfully submitted,

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